

LAW OFFICES
WILLIAMS & CONNOLLY LLP

725 TWELFTH STREET, N.W.

WASHINGTON, D. C. 20005-5901

(202) 434-5000

FAX (202) 434-5029

JOSEPH M. TERRY

(202) 434-5320

jterry@wc.com

EDWARD BENNETT WILLIAMS (1920-1988)

PAUL R. CONNOLLY (1922-1978)

May 26, 2020

Via ECF & Email

Hon. Sarah Netburn
U.S. District Court for the Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *Rich v. Fox News Network, LLC*, Case No. 18-cv-2223

Dear Judge Netburn:

Defendant Fox News Network, LLC writes in response to Plaintiffs' letter of May 22, 2020.

The documents that Plaintiffs seek to compel consist entirely of attorney-client communications between Ed Butowsky and the attorneys representing him in two other lawsuits, including one filed by the Plaintiffs' son, Aaron Rich. Because those documents appeared to be inadvertently-produced privileged documents, counsel for Fox News, consistent with our ethical obligations, inquired of Mr. Butowsky's counsel in those matters whether he in fact intended to produce the documents as part of a production to Fox News. Counsel for Fox News advised Plaintiffs that we were awaiting an answer from Mr. Butowsky's counsel and would also be willing to submit the documents to Your Honor for in camera review and guidance. Three hours later, Plaintiffs filed the instant letter motion, which was almost immediately picked up by a legal publication under the headline: "Seth Rich's Family Accuses Fox News of 'Hiding' Documents and Breaking Federal Law."¹

Regardless of Plaintiffs' motive in rushing to file this letter—or in seeking to compel the production of attorney-client documents relating to their son's litigation—their request is clearly meritless. Contrary to Plaintiffs' assertion that Fox News is attempting to "hide" these documents and make "unilateral determinations about Butowsky's privilege," Fox News has (1) agreed to

¹ The headline has since been modified to say that "Seth Rich's Family Accuses Fox News of 'Hiding' Documents and Violating Federal Rules." See <https://lawandcrime.com/lawsuit/seth-richs-family-accuses-fox-news-of-hiding-documents-and-breaking-federal-law/>.

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promptly produce all nonprivileged documents (and plans to do so this week) and (2) proposed submitting the privileged communications for in camera review.

As Fox News advised Plaintiffs, it has twice contacted Mr. Butowsky's lawyer and not yet received his response on how to address the seemingly inadvertent production of privileged communications. A response from that lawyer could easily resolve this dispute. Plaintiffs have not explained why they are unwilling to wait for the lawyer's reply or why they have not considered contacting him, either directly or on a joint call with Fox News, before rushing to Court. Equally inexplicable is Plaintiffs' rejection of Fox News's offer to submit the documents to this Court for guidance. It is precisely because Fox News sought to avoid a "unilateral" decision regarding the privilege, while maintaining its ethical obligations toward what appeared to be inadvertently produced privileged documents, that Fox News made these offers. *See Employers Ins. Co. of Wausau v. Skinner*, No. 07-cv-735, 2008 WL 4283346, at *11 (E.D.N.Y. Sept. 17, 2008) ("It is well-settled that a lawyer who receives materials that on their face appear to be subject to the attorney-client privilege . . . should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them."); N.Y. Rules of Professional Conduct 4.4(b). Whether the documents are ultimately produced is irrelevant to Fox News. If Mr. Butowsky's counsel informs us that they were produced intentionally, we will promptly produce them to Plaintiffs.

Plaintiffs have yet to explain why they believe they are entitled to an opposing party's privileged communications with his attorneys. They have no credible argument that the privilege has been waived. The protective order in this case expressly provides that inadvertent production of privileged documents does not constitute a waiver. *See* Am. Protective Order ¶ 6. Moreover, Mr. Butowsky may wish to assert a different basis, such as the common interest privilege, to argue that his production to Fox News does not amount to a waiver. Plaintiffs appear to have ignored Mr. Butowsky's potential interests entirely, just as they did earlier this month in failing even to serve Mr. Butowsky—until prompted by undersigned counsel—with a supplemental letter arguing that his motion to dismiss should be denied.

Plaintiffs' suggestion that Fox News has been dilatory in producing the documents it obtained from Mr. Butowsky is also meritless. As Fox News previously told Plaintiffs and the Court, these documents came to Fox News with significant production errors—including multiple different documents produced under the same Bates number. For the mutual benefit of the parties, Fox News used its own resources to place a second Bates stamp on these documents so they would have a single, continuous Bates range. It was while Fox News was preparing these documents for production to Plaintiffs that Fox News noted the inclusion of attorney-client communications. Fox News promptly alerted the lawyer who had produced these documents on Mr. Butowsky's behalf, and then contacted him a second time—most recently on May 14—when it did not receive a response. Fox News respectfully submits that its efforts to address the significant issues with Mr. Butowsky's production have been diligent.

Plaintiffs' cries of delay ring particularly hollow given that they have inexplicably failed to produce documents to Fox News that they obtained through *three separate third-party*

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subpoenas. Plaintiffs informed us on May 5 that they had received these productions, and they have given no reason for failing to turn them over at this time. One of these productions was from Aaron Rich, which may very well contain the documents now at issue.

Fox News respectfully suggests that it would be appropriate to give the lawyer representing Mr. Butowsky in the Aaron Rich litigation, a solo practitioner, an opportunity to address the inadvertent production of attorney-client communications before burdening the Court. If the parties are not able to resolve the issue through this means by June 2—or another date ordered by the Court—Fox News suggests submitting the documents for in camera review or otherwise following whatever direction the Court deems appropriate.

Sincerely,

/s/Joseph M. Terry
Counsel for Fox News Network, LLC

Cc: Counsel of Record and Ed Butowsky